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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 345

PAUL WILSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 182–188) has not yet been reported. The opinion of the district court appears at pages 169–172 of the record.

JURISDICTION

The judgment of the circuit court of appeals was entered June 11, 1945 (R. 181), and a petition for rehearing was denied July 23, 1945 (R. 209). The petition for a writ of certiorari was filed August 20, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial

Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether there was sufficient evidence to support petitioner's conviction under count 1 for carrying on the business of a wholesale liquor dealer without having paid the special tax required by law.

2. Whether there was a ceiling price applicable to the sales made by petitioner which form the basis of counts 3 and 4 of the indictment.

3. Whether the Twenty-first Amendment to the Constitution precludes the establishment of maximum prices for sales of alcoholic beverages under the Emergency Price Control Act.

STATUTES AND REGULATIONS INVOLVED

The pertinent statutes and regulations involved appear in the Appendix, *infra*, pp. 9–12.

STATEMENT

Petitioner was convicted by the court without a jury on counts 1, 3, 4 and 6 of a six-count indictment returned against him in the United States District Court for the Eastern District of Kentucky (R. 11–15, 16, 171). Count 1 charged that between February 14 and 22, 1944, petitioner carried on the business of a wholesale liquor dealer at Sharp's Tourist Court, Middlesboro,

Kentucky, without having paid the special tax required by law (R. 11). Counts 3, 4 and 6 charged violations of the Emergency Price Control Act by sales of liquor above ceiling prices at Sharp's Court and Wallsend, Kentucky (R. 12–13, 14–15). Petitioner was sentenced to imprisonment for one year and to pay a fine of $5,000 on each of counts 3 and 4, the sentences to run consecutively. He was sentenced to imprisonment for two years and to pay a fine of $2,000 on count 1 and to imprisonment for one year on count 6, the latter sentence to run concurrently with that imposed on count 1. Execution of the prison sentence on counts 1 and 6 was suspended and petitioner was placed on probation for five years, provided that he pay the fines imposed against him within a period of two years (R. 39–40). On appeal, the judgment was affirmed (R. 181).

The evidence for the Government may be summarized as follows:

Petitioner operated a wholesale and retail liquor business at Wallsend, Kentucky (R. 139). In January or February 1944, after Wallsend had been voted dry under local option, petitioner leased Sharp's Tourist Court in Middlesboro, Kentucky, including a retail liquor store operated there (R. 140–142, 146, 153). He received a state liquor license for the Sharp's Court store on February 29, 1944 (R. 141), and a federal stamp on April 1, 1944 (R. 133).

On February 14, 1944, Barrett and Dolen, two dealers in illicit liquor who worked together (R. 86), purchased a case of Paul Jones Whiskey from petitioner at Sharp's Tourist Court, paying petitioner $90 in cash for the case (R. 76–77, 106, 111). Petitioner told them that he had two more cases at his Wallsend store, but when they arrived there they found that one case had been disposed of. They purchased the remaining case from petitioner's clerk for $90 in cash (R. 77–78, 111–112). The maximum retail price for Paul Jones whiskey under O. P. A. regulations was $45.95 and the wholesale price approximately 25 percent less (R. 101). These sales form the basis of counts 3 and 4 of the indictment.

On February 20, 1944, these same men purchased from petitioner at Sharp's Tourist Court two cases of Rocking Chair and one case of Spring Hill whiskey. They paid petitioner in cash at the rate of $72.50 and $75.00 a case, respectively (R. 79–80, 107, 113). Petitioner removed the serial numbers from the three cases of whiskey before delivering them (R. 109–110, 117). The maximum price for such liquor was $36.00 at retail and 25 percent less at wholesale (R. 102).

On February 21, 1944, when an investigator of the Alcohol Tax Unit called at the Sharp's Court store, he found petitioner behind a counter, apparently in charge (R. 94, 98). When petitioner was asked whether that was his place of business,

he stated that he could not openly take charge because he had not yet received a state license (R. 94, 97, 99). This sale forms the basis of count 6 and is one of the elements of proof of count 1.

ARGUMENT

1. Petitioner contends (Pet. 4, 6, 10, 11–13) that the evidence is insufficient to support his conviction on count 1 for carrying on the business of a wholesale liquor dealer at Sharp's Court because there was proof of only one sale of more than five gallons at such location, i. e., the sale of February 20, 1944 (see Statement, *supra*). However, as the court below pointed out (R. 184), evidence to establish the offense charged need not necessarily show more than a single sale where there are corroborating circumstances supporting the conclusion that defendant was engaged in the wholesale liquor business as a dealer. *Bailey* v. *United States*, 259 Fed. 88, 92 (C. C. A. 6); *Sodini* v. *United States*, 261 Fed. 913, 914 (C. C. A. 6); *Johnson* v. *United States*, 84 F. 2d 114, 115 (C. C. A. 5). In fact, a conviction under this statute has been sustained although no sales of more than five gallons were actually consummated. *Taran* v. *United States*, 88 F. 2d 54, 58 (C. C. A. 8). The circumstances that petitioner had previously been engaged in the wholesale liquor business, that he appeared to be in charge of the Sharp's Court store during February, that there

was a substantial amount of liquor on hand when petitioner took charge of the store openly on March 1, 1944 (R. 147), all justified the trier of facts in concluding that the sale of February 20, 1944, was not an isolated transaction, but part of petitioner's business as a wholesale liquor dealer.

2. Petitioner argues (Pet. 4–5, 7, 10, 14–16) that before May 2, 1944, when the Office of Price Administration amended Maximum Price Regulation 445, fixing ceiling prices for liquor, to provide by Amendment 15 that persons acting as finders were to be considered agents of the seller, it was legitimate for retailers to pay finders' fees and to add such fees in determining the retail ceiling price; that since the witness from the Office of Price Administration who testified as to ceiling prices did not consider finders' fees, there was no proof that the sales which form the basis of counts 3 and 4 were made at prices above ceiling. The argument is obviously without merit. Section 5.3 of Maximum Price Regulation 445, *infra*, pp. 10–11, specifically fixes the elements of net cost from which the retail ceiling price is determined as the "supplier's" selling price, not in excess of his ceiling price, freight charges, and taxes. Manifestly, even if a retailer were willing to pay a finders' fee, and there is no proof in this case that petitioner did so, he would not be entitled to consider such fee as an element in determining his ceiling price.

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alidly exercised in further-
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324 U. S. 293, 299; *Jameson*
7 U. S. 171, 172–173; *Taub* v.
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(C. C. A. 6).[1]

[1] Petitioner contends (Pet. 5–6, 7–8, 10–11, 23) that his conviction should be reversed because one Floyd pleaded guilty to selling the same liquor (Rocking Chair and Spring Hill) petitioner was charged with selling in counts 1 and 6. The testimony of Barrett and Dolen that they had bought the liquor from petitioner was unequivocal (*supra*, p. 4). In addition it should be noted that counts 1 and 9 of the indictment to which Floyd pleaded guilty mentioned a number of cases of whiskey of brands other than Spring Hill and Rocking Chair (R. 30–31, 35–36), and that both Barrett and Dolen testified that they had purchased liquor from petitioner on the night of February 20 and that, at the time of their arrest, they were transporting liquor obtained from persons other than petitioner (R. 80–82, 90, 93, 114).

CONCLUSION

The decision below is correct; it presents no conflict of decisions or question of general importance. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

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SEPTEMBER 1945.